



USING POST-*DOBBS* INTERSTATE ABORTION ISSUES TO TEACH FEDERALISM

Matthew P. Cavedon

Competent American citizenship and governance require an understanding of federalism. Analysis of post-*Dobbs* interstate abortion issues highlight very important features of and debates about federalism for students.

American federalism was designed with two key features: sovereignty of states over their own laws and the end of interstate restrictions on trade and travel. The Founders wanted to preserve people's authority to govern themselves in their own states while also creating a national union. Respecting both values is sometimes difficult. A modern challenge comes from the return of abortion regulation to the states. The U.S. Supreme Court overturned *Roe v. Wade* (1973) in *Dobbs v. Jackson Women's Health Organization* (2022), holding that the U.S. Constitution does not prevent states from limiting abortion.

Two of the biggest federalism questions that have arisen since then are: (1) Can a state prevent its residents from, or punish them for, having an abortion in another state? Lawmakers in Texas, Idaho, Missouri, and elsewhere are debating laws that would do so. (2) Can a state ban the importation of abortion pills? Louisiana prosecutors indicted a New York physician for sending pills to a pregnant teenager in the Pelican State. Analyses of these questions provide students and teachers with a deeper understanding of how our federal system attempts to respect both unity and diversity.

RIGHT TO TRAVEL

Through the Tenth Amendment to the U.S. Constitution, the people delegated certain powers to the federal government, and reserved to the states or their people all other powers. The states enjoy sovereign power to

address numerous political issues as they choose (this supports nationwide diversity). However, the Fourteenth Amendment protects all people's lives, liberty, and property from being deprived without due process of law (a provision that supports national unity). The Supreme Court says this language guarantees certain personal freedoms, including the right to travel, which are enjoyed by all people. The Court held that the right to travel stopped states from blocking the physical movement of people in a series of cases during the Civil Rights Era of the 1950s–1960s.

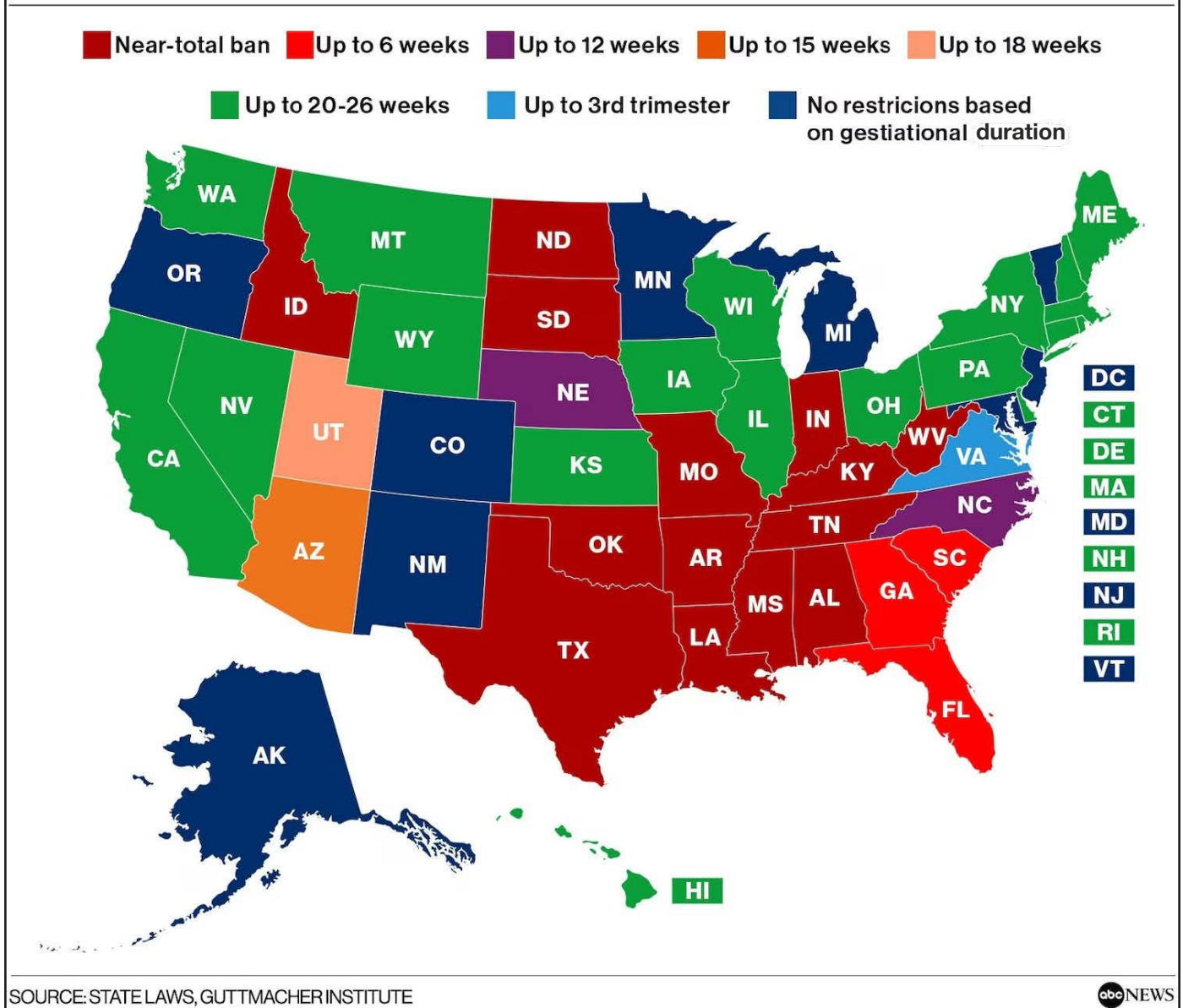
Some scholars argue that the right to travel should protect abortion travel. One difficulty with this idea is that the right to travel has not been applied to states punishing people once they return home. That is, it is unclear whether a state can punish its citizens who cross state lines to engage in behavior that is legal in another state but illegal in the home state. Additionally, the right to travel does not address whether a state can restrict steps taken within its borders to prepare for travel elsewhere. For example, can states punish conversations and preparations concerning acts they criminalize but are legal in the state where they would take place?

PRIVILEGES AND IMMUNITIES CLAUSE

Article IV's [Privileges and Immunities Clause](#) forbids states from discriminating against other states' citizens. A state cannot single out Americans visiting it for special restrictions, such as making them pay higher sales taxes than residents. Some people say this constitutional rule should protect abortion travel because a state that legalizes abortion must allow non-residents to undergo one inside it. However, this does not address whether a state could punish a citizen who returns home after having had an out-of-state abortion.

Abortion Access in the United States Post-Dobbs Decision

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CONFLICT OF LAWS RULES

In a system that respects state sovereignty and diverse state laws about a range of issues, like education, public safety, and transportation, conflicts of state laws often arise. The Supreme Court has developed rules for what happens when state laws require incompatible acts. “Conflict of laws” rules are often complicated, but courts try to chart a course for people, organizations, and businesses whose activities stretch across state lines. Whether or not a state law violates these rules depends on weighing states’ policies and interests against each other and against the rights of the people affected. For example, conflict of laws rules sort out which state’s laws govern a lawsuit brought

by an Oklahoma resident against a Michigan car company for damages arising out of an accident in Delaware (see *Allstate Insurance Co. v. Hague*, 1981).

Conflict of laws rules do not resolve issues around abortion travel, however. Courts have found it difficult to weigh policies, interests, and rights in the abortion context because there are totally different understandings of what is at stake. Many people believe abortion restrictions protect human lives. Many others believe restrictions infringe on privacy and people’s control over their own bodies. *Dobbs* came about partly because the Supreme Court did not believe judges could really “balance” these values. Conflict of laws rules may cause the same difficulty. How

can judges appropriately balance values when they cannot agree on how to frame the initial questions to begin their analysis?

FULL FAITH AND CREDIT CLAUSE

Article IV's [Full Faith and Credit Clause](#) requires states to respect each other's "public acts." That usually means states must enforce each other's court judgments, but this principle has two important limits: (1) no state is required to follow it against its own public policy, and (2) no state is required to enforce a judgment that is "penal," or aimed at punishing conduct.

Like the Privileges and Immunities Clause, this does not limit states' ability to punish people who come home after doing things elsewhere. A more typical case involving the Full Faith and Credit Clause asked whether Nevada courts had to recognize the immunity from lawsuits that California law gives to California state agencies (see *Franchise Tax Board of California v. Hyatt*, 2003). However, this Clause is relevant to interstate abortions in a different way. California and other states have considered blocking other states from accessing their medical and legal records to punish residents who travel to undergo abortions. The Clause's exceptions likely mean these laws are constitutional.

TERRITORIALITY

The last major federalism rule that could affect interstate abortion travel is territoriality. The Constitution's specific federalism rules, combined with historical legal decisions, suggest that acts can be punished only in the state where they are committed. Defining which state, say, an abortion telemedicine consultation happens in may be tricky. But if a state decides to legalize an abortion happening inside it, no other state should be able to punish that act. More analysis of territoriality can be found in my CSF-funded article "[Federalism Limits on State Criminal Extraterritoriality](#)."

However, territoriality does not stop states from restricting the importation of abortion pills. Two other federalism rules may relate to that issue.

COMMERCE CLAUSE

Article I gives Congress the authority to regulate interstate commerce. For 200 years, the Supreme Court has interpreted this provision as limiting states' ability to restrict interstate trade, a rule known as the "[Dormant Commerce Clause](#)" (see *Gibbons v. Ogden*, 1824). This rule applies

an implicit (i.e., dormant) restriction on state power when states use their power to gain an economic advantage over other states. States cannot, for example, place extra taxes on goods or services coming from other states. Even facially neutral state laws that have the effect of placing an "undue burden" on interstate commerce are unconstitutional. This doctrine does not affect states' ability to limit what acts are legal within it; so long as states do not treat in-state and out-of-state sources differently, they can stop the importation of guns, marijuana, and abortion pills.

However, the Commerce Clause may limit state restrictions on abortion pills in another way. States cannot contradict interstate commerce regulations enacted by Congress. This doctrine is called "[preemption](#)." Congress has authorized the Food and Drug Administration (FDA) to decide what medications can be sold legally within the United States. In turn, the FDA has authorized the prescribing of abortion pills (and because of telemedicine, Americans living in states that restrict abortion can now often get prescriptions for these pills from doctors in other states). Some scholars argue that FDA authorization preempts state restrictions on abortion pills. Other people respond that the FDA simply says these pills *can* be sold, not that states must allow them to be sold.

CONCLUSION

The federal system is an institutional expression of both unity and diversity. Each state enjoys sovereignty over its own laws (diversity), but all people should be free to travel and trade unencumbered by individual states (unity). These are defining features of American federalism. A closer examination of abortion issues helps equip students with a deeper understanding of how the federal system operates and addresses dynamic political issues.

Reconciling federalism principles for issues surrounding abortion regulation will require a fresh look at constitutional doctrines. The Supreme Court has held that it will no longer decide abortion issues based on competing notions of life and liberty, and that the people of each state can advance their own understanding of those values. But courts will now have to say more precisely where one state's authority ends and another's begins.



ABOUT THE AUTHOR

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